Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	**WC Docket No. 02-361**
Petition for Declaratory Ruling that AT&T's	)	
Phone-to-Phone IP Telephony Services Are	)	
Exempt from Access Charges	)	
	)	

REPLY COMMENTS OF NET2PHONE, INC.

Net2Phone, Inc., ("Net2Phone"), submits these Comments in reply to the initial comments filed in the above-captioned docket pursuant to the Federal Communications Commission's ("Commission") November 18, 2002 *Public Notice.*[1]

AT&T's request is narrow and does not require an examination into the status of VOIP at the present time.

In its Petition, AT&T simply asks the Commission to confirm its longstanding policy and issue a declaratory ruling that providers of Voice over Internet Protocol ("VOIP") services are entitled to subscribe to local services and are exempt from interstate access charges unless and until the Commission adopts regulations that

[1] *Public Notice*, *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*, DA 02-3184, WC Docket No. 02-361, (November 18, 2002).

prospectively provide otherwise.[2] As stated in our Initial Comments, the status of VOIP is not the subject of this declaratory ruling and any attempt by the Bell Operating Companies ("BOCs")[3] to broaden the scope of the Commission's review should be denied. As demonstrated throughout these comments, the Commission has made its decision to forbear from regulating all VOIP and IP telephony services until it develops a full and complete record on the issue. BOCs improperly seek to use AT&T's Petition to revisit the Commission's prior decisions that rejected application of legacy access charges on VOIP and information services. As the BOCs well know, a declaratory ruling is not the proper forum to challenge existing Commission policies and decisions. As a result, the Commission should reject BOC claims challenging AT&T's Petition.

BOCs' reliance on the Commission's *Report to Congress* is misplaced.

Reduced to their core, BOC comments are uniformly based on the incorrect premise that the Commission held Phone-to-Phone IP telephony to be a telecommunications service subject to existing access charges.[4] Once this premise is

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[2] *Id.*

[3] Including other parties who filed comments in opposition to AT&T's Petition.

[4] *See* BellSouth Opposition to AT&T's Petition for Declaratory Ruling, at 2 (filed Dec. 18, 2002); *Id.* at 6 ("[P]hone-to-phone IP telephony is a telecommunications service."); Comments of Qwest Communications International Inc., at 6 (filed Dec. 18, 2003) ("AT&T's phone-to-phone IP telephony service is a telecommunications service subject to payment of carriers' carrier charges for access to local exchange switching facilities in the provision of interstate service."); Opposition of SBC Communications Inc., at 2 (filed Dec. 18, 2002); *see also,* Opposition of Verizon, at 4 (filed Dec. 18, 2002) ("[U]nder the Commission's current construction of the [Communications] Act, phone-to-phone Internet telephony is a telecommunications service . . ."). (Collectively, "General BOC comments").

negated, BOCs have no basis upon which to unilaterally assess access charges on VOIP services or to engage in any other self-help measures in contravention of the Telecommunications Act of 1996 ("Act")[5] and Commission decisions.

BOCs assert that the Commission's *Universal Service Report to Congress* ("*Report*") affirmed a longstanding policy to regulate IP telephony as a telecommunications service.[6] To the contrary, the Commission has always maintained that all VOIP services are not regulated.[7] The Commission confirmed that prior to the *Report* it had "not formally considered the legal status of IP telephony" as differing from any other information services.[8] With regards to information services, the Commission found "that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services "via telecommunications."[9] Likewise, in forbearing from regulating phone-to-phone IP services, the Commission intended to maintain a hands-off approach where VOIP services are not regulated as common carriers merely because they may provide their services via telecommunications networks.

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[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 State. 56 (codified at 47 U.S.C. §§151 et. seq.)

[6] *See* General BOC comments.

[7] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 FCC 2s 267 (1971) ("Computer I"); *see also Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),*77 FCC 2d 384 (1980) ("Computer II"); *see also, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1943,* 11 FCC Rcd 21905 (1996);

[8] *Report* at Para 83.

[9] *In the matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, 13 FCC Rcd 11501, Release Number 98-67, (released April 10, 1998), (Universal Service Order) at para. 13.

Moreover, in a 1997 policy paper, the Office of Plans and Policy urged the Commission to maintain its longstanding refrain from regulating IP Telephony in order to permit the development of this nascent technology.[10] The Commission's *Report* followed a similar rationale when the Commission expressly declined to regulate phone-to-phone IP as a telecommunications service. Specifically, although the Commission tentatively concluded that "the record before [it] suggest[ed] that certain 'phone-to-phone IP telephony' services lack[ed] the characteristics that would render them information services" it did "not believe that it [was] appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings…"[11]. Essentially, the Commission refused to explicitly differentiate VOIP from any other information service until it conducts a comprehensive evidentiary review in future proceedings.

One year later, the Commission reaffirmed its policy when it declined to address US West's petition that sought to impose access charges on VOIP providers.[12] Thus, neither the *Report* nor the Commission's subsequent actions created a new policy or ever supported the imposition of access charges on VOIP services. The Commission should therefore prohibit any attempts by carriers to impose access charges on VOIP.

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[10] *See* Digital Tornado: The Internet and Telecommunications Policy *by Kevin Werbach; March 1997, NTIS PB97 161905.* Office of Plans and Policy Working Paper No. 29, pp. 36–41.

[11] *Report* at para. 83.

[12] *See Petition of US West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony,* Petition for Expedited Declaratory Ruling at ii, (Filed with the Commission April 5, 1999).

AT&T is not seeking a special exemption from payment of access charges because VOIP services are not subject to Title II regulation.

Certain parties assert that AT&T is seeking a "special exemption" from paying access charges on phone-to-phone IP services.[13] This assertion necessarily presumes that the Commission's forbearance from regulating IP telephony rises to the level of an express permission for BOCs to impose access charges on these emerging services. This argument is patently incorrect. The Commission declined to apply presumptive Title II regulation to any new and emerging Internet technologies by using its forbearance authority under Section 10(a) of the Act.[14] For instance, in forbearing from regulating information services, the Commission rejected an "approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers, and thus presumptively subject to the broad range of Title II constraints" and found that such an approach "could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the healthy and competitive development of the enhanced-services industry."[15] Similarly, regulation of VOIP as distinct from other information services would invariably curtail the regulatory freedom that VOIP technologies need to flourish. Since BOCs advocate an approach that the Commission has rejected in the past, the Commission should adhere to its existing policies and reject the BOCs' comments here.

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[13] Bellsouth Comments at 9.

[14] 47 U.S.C. §10(a).

[15] *Report* at para. 46 (*citing Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),*77 FCC 2d 384 (1980) ("Computer II").

BOCs blur the express distinction between information and telecommunications services in contravention of the Act and Congressional intent.

Since phone-to-phone IP is not treated differently from any other information service, BOC imposition of legacy access charges on developing VOIP services threatens to blur the express Congressional distinction between telecommunications and information services. In rejecting this rationale, the Commission reasoned that "if we interpreted the [Act] as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category" and that such a finding necessarily contravenes the "strong support in the text and legislative history of the 1996 Act for the view that Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services.[16] Since VOIP is presently treated in the same manner as any other information service, the same strict regulatory separation exists between VOIP and telecommunications services. The Commission should reject any position permitting carriers to unilaterally assess access charges on unregulated VOIP services, as this would fundamentally jeopardize the separation between telecommunications and information services.

[16] *Report* at para 57.

Application of the existing access charge regime on VOIP services would impose above-cost charges on VOIP providers.

BOCs ignore the actual language the Commission used in the *Report* when it declined to regulate VOIP as a telecommunications service. The Commission stated that "to the extent we conclude that certain forms of phone-to-phone IP telephony services are "telecommunications services," and to the extent the providers of those services obtain the *same* circuit-switched access as obtained by other interexchange carriers, and therefore impose the *same* burdens on local exchange as do other interexchange carriers, we *may* find it reasonable that they pay *similar* access charges."[17] (Emphases added). It is indisputable that the word "may" does not mean "must" and the word "similar" does not mean "the same." The Commission therefore declined to extend access charges to IP telephony, and noted that should it do so in the future, the charges would not automatically be the same as those assessed on telecommunications services.

Furthermore, prior to imposing any type of access charges on IP services, the Commission concluded that it must determine the extent to which VOIP providers "obtain the *same* circuit switched access" and whether such access "impose[s] the *same* burdens" on local networks as telecommunications services. The Commission's findings to date, however, demonstrate that VOIP, like other information services, does not impose the "same" burdens on local facilities as do telecommunications services. In its *Access Charge Reform Order* the Commission concluded as follows:

> "We decide here that ISPs should not be subject to interstate access charges. The access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to

[17] *Report* at para 91.

> remove rate inefficiencies. Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is *not clear that ISPs use the public switched network in a manner analogous to IXCs."* [18] (Emphasis added).

Equally, the Commission intended to make sure that before imposing any regulatory obligations and charges on VOIP, it must determine that VOIP services use BOC networks in the "same" way as telecommunications services. The Commission has not made such a determination. Rather, in its *Report*, the Commission reaffirmed the need for a more comprehensive evaluation by deciding to "examine these issues more closely based on the more complete records developed in future proceedings."[19] Until the Commission completes its comprehensive review and definitively determines the extent to which specific VOIP services use the local exchange, any imposition of existing access charges is necessarily above-cost.

The Commission went on to state that any future examination of phone-to-phone VOIP would be accomplished through an analysis of individualized service offerings.[20] Since VOIP can be provided in numerous ways, the Commission understood that different providers use local networks to varying degrees. The Commission reasoned that due to the

> "wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between other forms of IP telephony,

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[18] *Access Charge Reform,* First Report and Order, 12 FCC Rcd 15982, 16133-34 (1997), *aff'd, Southwester Bell Telephone Co. v. FCC,* 153 F.3d 523, 542 (8th Cir. 1998) ("Access Charge Reform Order").

[19] *Report* at para. 91.

[20] *Report* at para. 83.

> and is not likely to be quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible."[21]

In effect, the Commission rejected a blanket regulatory definition of phone-to-phone IP and made no determinations regarding specific service offerings. BOCs however impose blanket access charges regardless of the type of "individual" IP services provided or the extent to which these services use their networks. There is simply no basis for BOCs to impose legacy charges on phone-to-phone VOIP services until and unless the Commission determines the extent to which specific VOIP services use local networks. The Commission should not therefore sanction improper imposition of access charges on VOIP services.

As for compensation, the Commission declined to extend existing access charges to VOIP services. Indeed, in every proceeding where the commission could have differentiated VOIP from other information services, it declined to do so.[22] Notably, the

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[21] *Id.* at para.. 91.

[22] *See*, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service,* 15 FCC Rcd 12962 (2000) ("CALLS Order"), *aff'd in part, and remanded in part, Texas Office of Public Utilities Counsel et al. v. FCC,* 265 F.3d 313 (5th Cir. 2001), *cert. Denied, Nat'l Ass'n of State Util. Consumer Advocates v. FCC,* 70 U.S.L.W. 3444 (U.S. Apr. 15, 2002) ("CALLS Decision"); *see also, Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* 16 FCC Rcd 9923 (2001); s*ee also, Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers,* 16 FCC Rcd 19613 (2001)("MAG Order"); *see also, ISP Remand Order,* 16 FCC Rcd 1951, *rev'd in part on other grounds; WorldCom v. FCC,* 288 F.3d 429 (DC Cir. 2002).

Commission acknowledged that BOCs are duly compensated through the compensation scheme applicable to information services. The Commission reasoned that "ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs" and stated that it was "not convinced that nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs."[23] Likewise, the Commission should not be convinced that nonassessment of access charges results in VOIP providers imposing uncompensated costs on BOCs.

As discussed in detail in the joint comments filed by Kelley Drye & Warren, LLP, the Commission's decision to exclude IP services from the current access charge regime resulted from several years of comprehensive proceedings. In doing so, the Commission struck a careful balance to ensure that carriers are duly compensated for use of their networks while imposing access charges that are just and reasonable as applied to telecommunications services only.[24] Unilateral imposition of existing access charges on VOIP undermines that balance and circumvents the Commission's authority to ensure that all rates are just and reasonable.

By engaging in self-help, BOCs hope to bootstrap existing regulations onto new technologies without providing any verifiable evidence (*e.g.,* cost studies) or demonstrating that existing access rates are cost-based as applied to VOIP services. Simply stating that a rate is cost-based does not make it so. Aside from conclusory statements, BOCs fail to provide any evidence that demonstrates any negative economic

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[23] *Access Charge Reform Order* at 16133-34.

[24] *See* Joint Comments of The American Internet Service Providers Association; The Connecticut ISP Association; Core Communications, Inc.; Grande Communications, Inc.; The New Mexico Internet Professionals Association; Pulver.com; and US Datanet Corporation by Kelley Drye & Warren LLP, at 23-33.

impact resulting from the treatment of VOIP under the information service compensation regime. The Commission should therefore reject BOC efforts to circumvent well-settled policy and should issue a declaratory ruling that access charges do not apply to VOIP services.

The Commission should provide guidance to the States.

As noted in AT&T's Petition, although the Commission's forbearance from regulating VOIP is clear, several state commissions (Colorado, Florida, and New York) have issued inconsistent rulings with regard to their treatment of phone-to-phone IP telephony.[25] More recently, the Florida Public Service Commission has initiated a workshop devoted to phone-to-phone VOIP services.[26] Among the issues scheduled for discussion are: the current state of federal law, and how other states have addressed VOIP. As always, states will look to the Commission for guidance in drafting their own policies and regulations. In order to foster regulatory and market certainty for both consumers and providers of IP telephony and to provide needed guidance for the states, the Commission should issue a declaratory ruling that expressly confirms its current policy of exempting VOIP services from access charges.

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[25] *AT&T Petition* at 21-22 (*Citing Petition of ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with U.S. West Communications, Inc.,* No. C00-858 (Colorado Pub. Util. Comm'n, Aug. 1, 2000); *Investigation into Appropriate Methods to Compensate Carriers for Exchange Traffic Subject to Section 251 of the Telecommunications Act of 1996,* No. 000075-TP (Florida Pub. Serv. Comm'n, May 31, 2002), and *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges,* No. 01-C-1119 (New York Pub. Serv. Comm'n, May 31, 2002)).

[26] *See Notice of Staff Workshop to All Interested Persons and All Other Interested Persons Re: Undocketed Phone-to-Phone Internet Protocol Telephony (Voice Over Internet Protocol, Florida Public Service Commission,* issued January 9, 2003.

Policy Implications.

The potential application of emerging VOIP technologies remains unlimited as long as the Commission maintains its policy of deregulation. Companies such as Net2Phone are investing substantial resources to test and develop IP technologies to offer high quality low cost solutions to consumers. Recognizing the potential of IP technologies the Commission meaningfully noted that "[w]e can only speculate about the technologies and services that will be offered in the future…" and "[w]e must take care to preserve the vibrant growth of these technologies."[27] In order to preserve the vibrant growth of IP, the Commission recognized that regulation "would only restrict innovation in a fast-moving and competitive market."[28]

To force legacy regulations on any form of VOIP would halt its development and prevent consumers from garnering the benefits resulting from choice in their communications services. Imposition of access charges on VOIP would unavoidably be the first and most significant step towards complete federal and state regulation of all information services. Such a result would be contrary to both the Commission's stated policy and Congressional intent to implement the goals of the Act by establishing a "pro-competitive, deregulatory national policy framework" in order to promote technological development for the benefit of consumers.[29]

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[27] *Report* at para 2.

[28] *Report* at para 26, (*citing the Computer II Final Decision,* at 434, para. 129).

[29] 47 U.S.C. §§151 *et. seq.*

CONCLUSION

For the foregoing reasons, Net2Phone requests that the Commission declare that all VOIP services are exempt from access charges and prohibit any further unilateral imposition of above-cost charges on VOIP services.

Respectfully submitted,

_[electronically filed]_____
Elana Shapochnikov
Associate General Counsel
Net2Phone, Inc.
520 Broad Street
Newark, New Jersey 07102-3111
Tel: (973) 438-3686
Fax: (973) 438-3100
Email: eshapo@net2phone.com

Certificate of Service

I hereby certify that on this 24th day of January, 2003, I caused true and correct copies of the foregoing Reply Comments to be deposited in the U.S. Mail, first-class, postage prepaid (unless otherwise noted) to the addresses listed on the attached Service List.

Dated: January 24, 2003
Newark, NJ

/s/ Elana Shapochnikov
Elana Shapochnikov

SERVICE LIST
WC Docket No. 02-361

David W. Carpenter
Sidley Austin Brown & Wood
Bank One Plaza
10 S. Dearborn
Chicago, IL 60603

David L. Lawson
Julie M. Zampa
Sidley Austin Brown & Wood LLP
1501 K Street, NW
Washington, DC 20005

Mark C. Rosenblum
Lawrence J. Lafaro
Judy Sello
AT&T Corp.
Room 3A229
900 Route 202/206 North
Bedminster, NJ 07921

Tamara Preiss
Division Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Michelle Carey
Division Chief, Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20544

Brad Mutschelknause
Edward A. Yorkgitis, Jr.
Todd D. Daubert
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Staci L. Pies
Level 3 Communications, LLC
8270 Greensboro Drive
Suite 900
McLean, VA22102-3800

Mark D. Schneider
Jenner & Block, LLC
601 Thirteenth St. NW
Washington, DC 20005

Thomas Jones
Willkie Farr & Gallagher
1875 K Street, NW
Washington, DC 20006

Grover Norqvist
Americans for Tax Freedom
1920 L Street, NW
Suite 200
Washington, DC 20036

Danny E. Adams
Steven Augustino
Kelley Drye & Warren LLP
1200 19th Street NW, Suite 500
Washington, DC 20036

Audrie Krause
NetAction
601 Van Ness Ave #631
San Francisco, CA 94102

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington D.C. 20554

Russell M. Blau
Tamar E. Finn
Wendy M. Creeden
Swidler Berlin Shereff Friedman, LLP
3000 K Street NW, Suite 300
Washington, DC 20007

Stephen Pastorkovich
21 Dupont Circle, NW Suite 700
Washington, DC 20036

Doug Kitch
Beacon Telecommunications Advisors
2055 Anglo Drive, Suite 201
Colorado Springs, CO 80918

Richard A. Finningan
WA Independent Telephone Assn.
2405 Evergreen Park Drive, SW
Suite B1
Olympia, WA 98502

Stephen L. Earnest
Richard M. Sbaratta
BellSouth Corp.
Suite 4300
675 West Peachtree St., NE
Atlanta GA 30375

Jonathan Lee
Competitive
Telecommunications Assn.
1900 M Street, NW
Suite 800
Washington, DC 20036

Jeffrey F. Beck
Sean P. Beatty
E. Garth Black
Patrick M. Rosvall
Mark P. Schreiber
Cooper, White, & Cooper LLP
201 California Street, 17th Floor
San Francisco, CA 94111

William J. Warinner
Warinner, Gesinger & Associates
10561 Barkley Street, Suite 550
Overland Park, KS 66212

Gregg C. Sayre
Frontier Telephone of Rochester
180 South Clinton Avenue
Rochester, NY 14646-0700

Qualex International
qualexint@aol.com
Room CY-B402
445 12th Street, SW
Washington, DC 20554

Frederic G. Williamson
Fred Williamson & Associates
2921 East 91st Street, Suite 200
Tulsa, OK 74137-3355

Robin O. Brena
Brena, Bell & Clarkson, PC
310 K Street, Suite 601
Anchorage, AK 99501

Jeffry H. Smith
GVNW Consulting
P0 Box 1220
Tualatin, OR 97062

Jan F. Reimers, President
ICORE, Inc.
326 5. 2nd Street
Emmaus, PA 18049

Douglas Meredith
JSI
547 Oakview Lane
Bountiful, UT 84010

Azita Sparano
JSI
4625 Alexander Drive, Suite 135
Alpharetta, GA 30022

Richard Johnson
Moss & Barnett
4800 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402

TCA
1465 Kelly Johnson Blvd.,
Suite, 200
Colorado Springs, CO 80920

John M. Goodman
Verizon
1300 I Street, NW
Washington, DC 20005

Bruce D. Jacobs
Glenn S. Richards
Susan M. Hafeli
Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128

Suzanne Fannon Summerlin
Suzannne Fannon Summerlin,
P.A.
2536 Capital Medical Boulevard
Tallahassee, FL 32399

Lawrence G. Malone
NY Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Thomas G. Fisher, Jr.
Hogan & Fisher, P.L.C.
3101 Ingersoll Avenue
Des Moines, IA 50312

Norma Moy
Richard Juhnke
Jay C. Keithley
Sprint Corp.
401 9th Street, NW Suite 400
Washington, DC 20004

W.R. England, III
Brian T. McCartney
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
Jefferson City, MO 65102-0456

Richard A. Askoff
80 5. Jefferson Road
Whippany, NJ 07981

Sharon J. Devine
Robert B. McKenna
Kristin L. Smith
Qwest Communications
1020 19th Street, NW
Washington, DC 20036

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle
USTA
1401 H Street, NW, Suite 600
Washington, DC 20005

Carl Billek
IDT
520 Broad Street, 7th Floor
Newark, NJ 07102-3111

Jeffry A. Brueggeman
Gary L. Phillips
Paul K. Mancini
SBC Communications
1401 Eye Street, NW, Suite 400
Washington, DC 20005

Barclay Jackson
New Hampshire PUC
8 Old Suncook Road
Concord, NH 03301

Benjamin H. Dickens
Mary J. Sisak
Douglas W. Everette
Blooston, Mordkofsky, Dickens, Duffy & Prendergast
2120 L Street, NW Suite 300
Washington, DC 20037

L. Marie Guillory
Dan Mitchell
NTCA
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203